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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 939

SIERRA CLUB, a California corporation,
Petitioner,

vs.

WALTER J. HICKEL, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

ARGUMENT

The defendants and *amicus* Tulare County argue that neither the standing issue nor the substantive issues in this case warrant the time of this Court. They suggest that the Sierra Club's standing is not dispositive. Tulare also argues that the Ninth Circuit applied the proper test for the showing required to justify a preliminary injunction. They are wrong on all counts.

1. STANDING

The standing issue is dispositive as a matter of law since, if the Ninth Circuit decision on that point were upheld, the District Court could not entertain further proceedings. It is pure sophistry to argue that the standing issue is not dispositive because the Sierra Club could also lose the case on other issues. In effect, defendants ask this Court to postpone resolving the crucial standing issue over which the circuits are in conflict until a case in which it is the only issue comes along.

In this case, the Ninth Circuit denied the Sierra Club standing because it "does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened". (Pet. App. 10) We do not ask this Court to redecide whether the Sierra Club satisfied that erroneous test. We do ask this Court to decide that the Sierra Club met the true test of standing, as in *Parker v. Citizens Committee,* No. 614 and *Volpe v. Citizens Committee,* No. 615, in which certiorari was denied this term.

The sufficiency of the Sierra Club's complaint is not at issue. The District Court had affidavits, memoranda and the results of lengthy argument and answers to its questions available to it when it applied what it understood to be the law to resolve the question of standing.[1] Had

[1]The District Court found that the Sierra Club has standing not as erroneously stated by respondents "because of its general interest in conservation matters" (Def. B 4) but because it found that "[f]or many years the SIERRA CLUB by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested. One of the prin-

the District Court been located in the D.C. Circuit, or the Second Circuit, it would have been affirmed. See *Environmental Defense Fund, Inc. v. Hardin,* 428 F. 2d 1093 (D.C. Cir. 1970); *Citizens Committee for Hudson Valley v. Volpe,* 425 F. 2d 97 (2d Cir. 1970); *cert. denied* December 7, 1970; *Scanwell Laboratories, Inc. v. Shaffer,* 424 F. 2d 859 (D.C. Cir. 1970).

We ask this Court to grant the Writ to resolve the conflict.

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2. INJUNCTION STANDARDS

The Sierra Club's petition called attention to the conflict between the circuits on the standard governing the grant of preliminary injunction created by the Ninth Circuit's decision in this case. The Ninth Circuit required a showing of "reasonable certainty" that the Sierra Club would ultimately prevail. That holding is at odds with the generally accepted and far less stringent standard of *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F. 2d 738 (2d Cir. 1953), discussed at page 19 of the petition.

The suggestion that a higher standard is proper whenever the plaintiff seeks to enjoin federal administrative action is an erroneous generalization rooted in an inapplicable concept. The cases cited by Tulare show this. They derive, with a single exception, from *Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F. 2d 921 (D.C. Cir. 1958), which requires a "strong showing that [plaintiff] is likely to prevail on the merits of its appeal" when,

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cipal purposes of the SIERRA CLUB is to protect and conserve the national resources of the Sierra Nevada mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants." (Pet. App. 40)

having been ruled against in an administrative decision, it seeks to stay or enjoin the administrator from giving effect to the order pending an appeal. The higher standard applies to such cases because the stay is sought after plaintiff has lost on the merits. It then acts as an "intrusion into the ordinary processes of administration and judicial review." (259 F. 2d at 925).

Where, by contrast, the plaintiff has had no opportunity to be heard on the merits, the standard applied by the trial court is that of *Hamilton Watch Co. v. Benrus Watch Co., supra,* whether the defendant is a federal administrator or not. See *Baggett Transp. Company v. Hughes Transp., Inc.,* 393 F. 2d 710, 716-17 (8th Cir. 1968); *United States v. Moore,* 427 F. 2d 1020 (10th Cir. 1970).

Neither does *A Quaker Action Group v. Hickel,* 421 F. 2d 1111 (D.C. Cir. 1969) support application of a higher standard to this case. Upholding the trial court's grant of a preliminary injunction against the enforcement of federal regulations, the court in that case did not apply any special test. It noted with approval those cases which set forth the general requirements for granting a preliminary injunction. (421 F. 2d at 1116, f.n. 8) Those cases restate the rule of *Hamilton Watch Co. v. Benrus Watch Co., supra.*[2]

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[2]See, e.g., *Industrial Bank of Washington v. Tobriner,* 405 F. 2d 1321 (D.C. Cir. 1968), and *National Lawyers Guild v. Brownell,* 225 F. 2d 552 (D.C. Cir. 1955) where the court said, in a suit to enjoin an administrative act of the Attorney General: "A motion for preliminary injunction requires the court to determine whether there are substantial *questions* and whether there would be irreparable injury to one party or the other, and to balance the equities between the parties." (225 F. 2d at 554) (emphasis added)

Applying the proper standards, Judge Sweigert found "that plaintiff has raised questions . . . sufficiently substantial and serious to justify a preliminary injunction" and that it made "a sufficient showing of imminent and irreparable injury to require pendente lite relief." (Pet. App. 41, 42)

Tulare's suggestion that *Virginia Petroleum Jobbers Ass'n v. FPC, supra,* and its progeny require that a higher probability of success must be shown "before an injunction which will adversely affect the public will be issued" in favor of a private interest is not only inapplicable to this case in which the Sierra Club is seeking to protect a public interest, but erroneous as a matter of law.[3]

Parting company with *amicus* Tulare, the defendants correctly acknowledge that the "reasonable certainty" test is applicable to this case only if there was no threat of irreparable harm. In arguing that the Club was not threatened, they rely upon the erroneous test of standing applied by the Ninth Circuit.[4] With the Club's standing to represent the public interest confirmed by this Court, they will be forced to concede that the District Court was correct in finding a threat of irreparable harm to that public interest and that the District Court applied the proper test.

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[3]Where a public interest is involved, the effect upon it of an injunction must be weighed, not against the probability of success, but against the irreparable harm to plaintiff's private interest if the injunction is not granted. *Virginian R. Co. v. System Federation R.E.D.,* 300 U.S. 515 (1936); *Yakus v. United States,* 321 U.S. 414 (1944)

[4]See footnote 2 (Def. B. 7-8).

Defendants' suggestion that the public interest in preventing irreversible damage to public lands contrary to the will of Congress is overbalanced by the effects of delay upon skiers lacks merit. Even if the law were, as it is not,[5] that the District Court is charged with considering interests not before it, defendants fall far short of inventorying the many public interests which are involved. Tulare County in its *amicus* brief adds one economic interest. It omits others. As examples, the prospect that the tremendous traffic attributable to the resort could produce smog and make Tulare County residents unhappy is a public interest. The diversion of 22 million dollars in State funds from Southern California freeways in order to pay for the Mineral King highway which could compound the problems of motorists also is a public interest.

Plainly, it was in the broadest interest of the public to preserve the status quo while the substantial issues which would determine the legality of the project could be determined.

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3. SUBSTANTIVE ISSUES

Defendants have challenged only a portion of legal argument advanced by the Sierra Club on substantive issues. Their brief contains errors which may have led them astray. Those errors on key factual issues underline why this Court must intervene not only as to the far-reaching issues of law, but in the exercise of its supervisory authority. The Ninth Circuit abused its discretion by attempting to dispose of the merits of the

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[5]cf. *Erie-Lackawanna Railroad Company v. United States*, 259 F. Supp. 964, 971 (S.D.N.Y. 1966), *rev'd on other grounds* 386 U.S. 372 (1967)

case, including substantial issues of fact, before either side had an opportunity to establish those facts with discovery and testimony.

a. Defendants erroneously suggest that Disney's major facilities would be located only on the 80 acres of National Forest land covered by the term permit issued pursuant to 16 U.S.C. §497. They refer specifically to parking facilities. (Def. B. 3)

The record shows that a five story parking structure, sewage treatment facilities and ski lifts would be included in those major features which would be located outside the 80 acres on land to be covered by the so-called "revocable", supplemental permit. (R. 55-64, 71) The District Court so found. (Pet. App. 31). The Ninth Circuit did not overrule this finding, simply avoiding it.

Defendants refer to the supplemental permit as revocable. The record shows it isn't. They quote from Section 15 of the supplemental permit which states that "this permit may be terminated upon breach of any of the conditions herein or at the discretion of the Regional Forester or the Chief, Forest Service". (Def. B. 3) They fail to point out that the administrative regulations under which the permit would be issued bar its revocation at will.[6]

Without lifts, sewage disposal facilities, roads, avalanche dams, the parking structure, and the other major facilities which necessarily would be located outside the

[6]Under the Forest Service Manual ("F.S.M."), termination is equivalent to revocation (F.S.M. 2716.3(2)). Any revocation becomes the subject of an appeal under 36 C.F.R. §§211.20-211.119 to test its grounds and to ascertain whether the exercise of discretion was reasonable.

80 acre limit, the 35 million dollar investment in the ski resort would be destroyed. Revocation of the permit covering these facilities would be unreasonable *per se* if not by the judgment of Agriculture, then certainly by the court to whom Disney ultimately could appeal. Defendants also fail to note that a permit terminated for breach of a condition may be restored, since the permittee is afforded an opportunity to cure after notice. (F.S.M. 2716.3)

If more than the plain wording of the 80 acre limit of 16 U.S.C. §497 is necessary to divine the intention of Congress, the legislative history of the section is helpful. Upon issuance of a Writ, that history will be offered to this Court to prove that Congressional resistance to an increase in the acreage limitation from 5 to 80 acres was overcome by Agriculture's representation that the increased acreage was necessary because the service facilities of recreational developments and winter sports facilities including their ski lifts "are often strung out . . . and need elbow room" (1948 U.S. Code Cong. Service, pp. 1337, 1338). See also 1956 U.S. Code Cong. Service, p. 3636.

When Congress increased the limit to 80 acres in 1956, it amended the section to require that in addition to hotels, resorts and structures, those acres must include "any . . . *facilities* necessary or desirable for recreation, public convenience or safety." (July 28, 1956, C. 771, 70 Stat. 708) (emphasis added).

There is no evidence that Congress knew of an administrative practice of permitting the location of major, indispensable facilities on land covered by the revocable permit when it amended the section, whatever it may

have known about the practice of combining term and revocable permits.

This was not affected by the Multiple-Use Sustained Yield Act of 1960, 16 U.S. §§528-531, which was intended not to repeal clear limits upon the power of Agriculture, but rather to make explicit that which had been implicit for many years, namely, that its responsibilities include management of National Forests for recreation, range and wildlife purposes as well as for preservation, watershed management and timber production.

Contrary to the strawman set up by defendants, the Sierra Club does not challenge the power of the Secretaries to combine term and revocable permits *per se*. Neither does it challenge the legality of existing recreational developments which involve a combination of term and revocable permits.[7]

No evidence has been offered to show either that existing projects include indispensable, major facilities on more than 80 acres, or, more importantly, that any such conduct has been brought to the attention of Congress since 1956. "To find significance in congressional nonaction under these circumstances is to find significance where there is none." *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 141 (1941).

The District Court correctly observed that if Congress, when enacting and amending the acreage limitation, had in mind that it could be circumvented or nullified in this

[7]A decision that the combination of permits at Mineral King is illegal need not have retroactive effect. The Court may order that it apply only as to Mineral King and prospectively. *Safarik v. Udall*, 304 F. 2d 944 (D.C. Cir. 1962), cert. denied 371 U.S. 901 (1962).

fashion, ". . . it could have spared itself time and trouble by omitting any area limitation or by otherwise indicating its intent." (Pet. App. 35)

b. The Secretary of Agriculture is barred by 16 U.S.C. §688 from authorizing the project on game refuge land at Mineral King because for him to have found, contrary to the finding of personnel of the California Fish and Game Commission (R. 119), that location of the huge resort in the small, fragile, congressionally protected game refuge would be a use consistent with its purposes would have been a clear abuse of discretion.

c. The Secretary of the Interior is barred by 16 U.S.C. §1, from approving the highway across the Park. He again attempts to induce disinterest on the part of the Court by recasting a critical issue of law as one of fact. In this instance, the Secretary assumes that he may authorize construction and operation of a highway across a National Park for any purpose, provided that construction is influenced by the conservation purposes of the statute. This would deprive the statute of any meaning. He acknowledges in his brief that the purpose of this highway would be to provide access to a resort outside the Park. Evidence in the record makes clear that construction would have a profoundly adverse effect upon the Park. (R. 185). We, therefore, are met with the ultimate legal issue with significance beyond Sequoia National Park: Whether the Secretary of the Interior may authorize a use or construction in a national park the purpose of which is not to "conserve the scenery and the natural and historic objects and the wildlife therein and . . . leave them unimpaired for the enjoyment of future gener-

ations." (16 U.S.C. §1.) Congress has said clearly that he may not.

The highway conservatively estimated to cost 25 million dollars is *not* proposed because an existing road is inadequate for present uses. The sole impetus for the highway was the project, and its illegality is not mitigated by the fortuitous circumstance that a segment of a much longer road already crossed the area in question when it was incorporated into the Park.[8]

d. Defendants do not deny that the District Court's interpretation that 16 U.S.C. §45(c) requires congressional approval of the proposed transmission line across the Park is a reasonable one. Instead, they seek to insulate it from this Court's attention by referring to the issue as local and therefore unimportant. It is important because the refusal of this Court to deal with it would tell defendants that they may continue to disregard the clearly expressed will of Congress with impunity.

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4. MANAGERIAL DISCRETION

The power of the Secretaries over property of the United States is not plenary, as suggested by defendants. They have only those powers granted by Congress and

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[8]The highway would be on a new alignment. Defendants, in stating that the work of the State of California will be "to improve and partially reroute" the road, apparently have failed to consult the record, including the route study of the State of California (R. 115), as well as their reply brief, filed with the Ninth Circuit, in which they stated that "Professor Clarkeson of M.I.T., the Department's consultant, tried to follow the old road's contours, but this proved impracticable. The proposed road, therefore, will follow the old cut for only a short distance." (P. 12)

no more. *United States v. California,* 332 U.S. 19 (1946); *Udall v. Oil Shale Corporation,* 406 F.2d 759 (10th Cir. 1969).

Judicial deference to the interpretations of the executive occurs when he is acting within the limits, however broad, established by Congress. *Udall v. Tallman,* 380 U.S. 1 (1965)

Judicial reticence must end when, as threatened by Agriculture and Interior in this case, the executive attempts to act outside the limits of an unambiguous Congressional limitation or, when operating within those limits, he abuses his discretion by acting arbitrarily or unreasonably. *Ickes v. Underwood,* 141 F.2d 546 (D.C. Cir. 1944), *cert. denied* 323 U.S. 713 (1944). The cloak of his managerial discretion does not protect him from the consequences of these sins.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Writ of Certiorari should be granted.

Dated: January 1971.

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